

## Leslie Savage

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**From:** Leslie Savage  
**Sent:** Friday, February 23, 2018 7:22 AM  
**To:** Leslie Savage  
**Subject:** Alliance-NPDES delegation to RRC  
**Attachments:** NPDES Talking Points 2-18.docx; ATT00001.htm; FRED Resolution.docx; ATT00002.htm; SCR26 signed by governor.pdf; ATT00003.htm

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**From:** Lauren Spreen  
**Sent:** Thursday, February 22, 2018 1:52 PM  
**To:** Leslie Savage <Leslie.Savage@rrc.texas.gov>; Lori Wrotenbery <lori.wrotenbery@rrc.texas.gov>  
**Subject:** Fwd: FRED

Wanted to make sure you had the attached ahead of the upcoming IOGCC meeting. I've been told they will be pushing the issue. Let me know if you have any questions.

Here are talking points and back up to discuss federal delegations in light of the upcoming IOGCC - EPA meeting coming up. Attached are points and exhibits.

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## **Federal Regulatory Energy Delegation to Texas - Talking points**

- In 2017 the Texas Alliance of Energy Producers Board of Directors passed a resolution calling for the designation and return of as much federal agency authority in the oil field to Texas regulators. It was entitled "FRED", Federal Regulatory Energy Delegation
- In the 85<sup>th</sup> Legislative Session, Texas passed SCR 26, which has been signed by the Governor, supporting federal delegation of Authority to our State.
- There are several key federal regulations that could be delegated to Texas. One is the National Pollutant Discharge Elimination System permitting program for tested and treated oil field produced water and other oil field waste.
- The Railroad Commission of Texas has never been delegated this authority from the EPA. Authority over non-oil field industrial waste has been delegated to the TCEQ.
- By receiving this delegation, the RRC would eliminate duplicate permitting requirements so a permittee would not need to seek dual permits, one from the EPA and one from the RRC. The RRC would also be able to use this authority to judiciously enhance opportunities for produced water recycling and re-use.
- This Texas delegation initiative parallels a federal initiative call "*Cooperative Federalism*"

**Facts:** What Is the "Texas Pollutant Discharge Elimination System (TPDES)"? Regulatory program to control discharges of pollutants to surface waters. Texas assumed the National Pollutant Discharge Elimination System (NPDES) from the EPA Sept. 14, 1998. The state of Texas assumed the authority to administer the [National Pollutant Discharge Elimination System](#) (NPDES) program in Texas on Sept. 14, 1998. NPDES is a federal regulatory program to control discharges of pollutants to surface waters of the United States. *The Texas Commission on Environmental Quality (TCEQ) Texas Pollutant Discharge Elimination System (TPDES) program now has federal regulatory authority over discharges of pollutants to Texas surface water, with the exception of discharges associated with oil, gas, and geothermal exploration and development activities, which are regulated by the [Railroad Commission of Texas](#).* (Note - info from TCEQ web site)

**Process:** The application of the State of Texas for authorization to administer the Texas Pollutant Discharge Elimination System (TPDES) consisted of 1. a letter from Governor George W. Bush (now President Bush) requesting the program, 2. a Memorandum of Agreement (MOA) between the Environmental Protection Agency (EPA) and the Texas Natural Resource Conservation Commission (TNRCC, now TCEQ) in Chapter 1, 3. a program description detailing all aspects of TPDES in Chapters 2 through 7, and 4. a description of our legal authority, called the Attorney General's Statement in Chapter 8. ((Note – info from TCEQ)

**Example:** Hydrostatic Test Water Discharge – RRC Permits to discharge hydrostatic test water (HT) are a minor permit processed by the Railroad Commission office in Austin. Pipelines must be tested to ensure safety. One method to ensure safety is to fill the pipe with water to see if it can handle the hydrostatic load. Once the water enters the pipe, it is considered oil and gas waste and so it cannot be discharged without a permit. A federal permit is also required.

### **Attachment 3 Instruction from RRC Surface Waste Management Manual - Application for a Permit to Discharge of Hydrostatic Test Water**

**NOTICE:** There is a 150 percent surcharge in addition to the \$300 fee normally associated with applying for a permit to discharge hydrostatic test water to surface waters. Total charge for a permit to discharge hydrostatic test water is \$750.

Permit Application for the Discharge of Hydrostatic Test Water Used to Test the Integrity of Natural Gas, Crude Oil, or Other Pipelines or Vessels Under Jurisdiction of the Railroad Commission of Texas.

**To ensure the efficient processing of your application, please read the [Hydrostatic Test Discharge Permit Application Frequently Asked Questions and Permit Processing Time Savers](#) as part of the preparation of your permit application.**

An operator must apply for a "minor permit" to discharge hydrostatic test water. The operator must file **two copies** of a written application containing the following:

1. Operator name, address, telephone number, and contact person. Note that unless otherwise specified in an application, the permit and correspondence will only be mailed to the operator's P-5 address.
2. Description of the pipeline or tank to be tested. Include information such as the location, dimensions, materials of construction, intended use, whether the pipeline or tank to be tested has been in service, for how long, and what type of service. Also, include whether a pipeline is a transmission line or a gathering line.
3. Indicate whether the pipeline or tank to be tested has or will contain fluids with H2S concentrations of 100 ppm or greater.
4. Identify the source of the water to be used for the test. (Should be a good quality water source such as a municipal water supply, drinking water well, irrigation well, clean source of surface water, etc.) Note: The use of surface waters may require a temporary water use permit from the Texas Commission on Environmental Quality (TCEQ). Contact the appropriate [TCEQ district office](#) for more information.
5. Description of any chemicals to be added to the test water, the purpose for using the chemicals, and the concentrations to be used. Provide product literature and material safety data sheets.
6. Projected dates for commencement and completion of the test and for commencement and completion of the discharge. Any permit issued will require notification of the Railroad Commission Pipeline Safety Office as soon as practical after any failure during testing.
7. Estimation of the total volume of test water to be discharged in gallons and discharge rate in gallons per minute.
8. Description of the location of the discharge point by latitude-longitude coordinates, by distance and direction from nearest post office or town.
9. Include a topographic map clearly depicting the pipeline or tank, the fill point, the discharge point, and the nearest body of surface water. If the discharged water will reach

surface waters of the State, show the route of flow of the test water from the discharge point to the nearest body of surface water.

10. Description of how the test water will be settled, filtered, or otherwise treated to prevent erosion and remove suspended solids, oil and grease, and other pollutants. (Any permit issued may require the permittee to sample and analyze the water being discharged and submit the results along with pictures of the treatment system and discharge.) Also, a description of how dissolved oxygen will be restored to the test water if it is going to reach any surface water body. No hydrostatic test water may be discharged within 5 miles of a drinking water supply intake.
11. Describe how test water will be stored prior to and after the testing is completed:
  - Will frac tank(s), vacuum or water truck(s) be used to fill or store the test water prior to filling the test pipe or tank(s)?
  - After hydrostatic testing is completed, will the test water be stored or staged in frac tank(s) prior to discharge?
  - Provide drawings, showing dimensions, any oil retention structures, (i.e. special piping, baffles, weirs, etc.) inside pits or tanks to minimize turbulence, control oil carry over and control water level, etc.

**Note:** Hydrostatic test water may require analytical testing prior to discharge. Analytical testing will be required if test water is stored in any pits, in frac tanks, or in trucks that have previously hauled waste. If the test water exceeds the limitations in Table 1 below, it is considered a hazardous waste by the U.S. Environmental Protection Agency (EPA) and must be handled, treated and disposed of in accordance with those regulations.

**Table 1: Hydrostatic Test Discharge Requirements**

<u>PARAMETER</u>	<u>LIMITATIONS</u>
Benzene (discharge to surface)	0.5 mg/L
Benzene (discharge to surface water)	0.05 mg/L
Oil & Grease	15 mg/L
Chemical Oxygen Demand	Report
Electrical Conductivity	Report
Total Suspended Solids	Report

1. If the test water will be allowed to drain across private property, include a statement that the landowner(s) have been notified of the proposed discharge and have not objected.
2. If testing a used pipeline or tank, a concise description should be given on how the pipeline or tank will be cleaned prior to testing. (Any permit issued may contain limitations on the levels of benzene, oil and grease, or other parameters that may be present in the water to be discharged as shown in Table 1 above). At a minimum for a used pipeline, a volume of water equal to 300 linear feet of the pipeline, or 1000 gallons, whichever is greater, must be pigged through the line prior to filling for the test. This

flush water may not be discharged under this permit and must be collected and disposed of properly.

3. There is a nonrefundable application fee for a permit to discharge oil and gas waste to surface waters of the state. **EFFECTIVE MAY 1, 2012, the total application fee will now be \$750, in accordance with Senate Bill 1 (82nd Legislature, First Called Session, 2011).** Checks or money orders should be made payable to "Railroad Commission of Texas". Please do not send cash through the mail. This fee is an application fee and is not refundable even if your application is returned, withdrawn, or denied. If test water will not be discharged to surface waters, the fee is not required; however, a signed statement must be provided indicating that no test water will reach surface waters of the state. Note, a permit from the U.S. EPA may be required for a discharge to surface waters under the National Pollutant Discharge Elimination System (NPDES). Contact EPA Region 6 in Dallas for more information.
4. You must certify the application as follows:

"I certify that I am authorized to make this application, that this application was prepared by me or under my supervision and direction, and that the data and facts stated herein are true, correct, and complete to the best of my knowledge."

The operator's representative responsible for ensuring that the hydrostatic test water is disposed of in a proper manner must sign the application.

File the application, including all attachments, with the Railroad Commission of Texas, Oil and Gas Division, Technical Permitting Section, P. O. Box 12967, Austin, TX 78711-2967.

Before any permit will be issued, the operator must have an active Organization Report (Form P-5) on file with the Austin Office of the Commission. For questions concerning the Form P-5 call the P-5 Department at 512-463-6772

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**Texas Alliance of Energy Producers**  
**Federal Regulatory Energy Delegation Resolution, 2016**

Whereas, the Texas Legislature recognizes that this period in our nation's history represents an opportunity for Texas to work with the leadership of the federal government to transcend partisan politics and correct the repeated misuse of federal regulatory power that has threatened the livelihood of the Texas oil and gas industry, the jobs of our citizens, and the economy of our great State of Texas;

Whereas, let it be proudly said that our Texas oil and gas fields have provided a pathway toward American energy independence from foreign and hostile energy cartels, afforded good jobs and security to hundreds of thousands of individuals in Texas, and delivered safe and reliable energy to fuel our national economy;

Whereas, during the past 8 years the federal government has embarked on a deliberate and determined regulatory war focused on the oil and gas fields of Texas;

Whereas, massive new federal regulations have been proposed and implemented despite the protests of Texas and many other oil and gas producing states, resulting in a complicated maze of over-regulation that creates more economic pain with little environmental gain;

Whereas, the State of Texas has joined many other oil and gas producing states to file more than 20 lawsuits against federal overreach in an effort to protect our families and our livelihood;

Resolved, that the 85th Texas Legislature of the State of Texas hereby respectfully urge the United States Congress and the Executive Branch of the United States Federal Government to identify key federal regulations currently under the authority of the Environmental Protection Agency, Department of the Interior, Department of Energy and other federal agencies, to evaluate if they should be left alone, revised, delegated to state agencies, or eliminated; and to work in conjunction with the State of Texas on federal regulatory energy delegation of authority and requisite funding to carry out such delegation to Texas' relevant state regulatory agencies in an effort to ease the over-burdensome regulatory patchwork on the oil and gas industry in Texas.

Resolved, that the secretary of state forward official copies of this resolution to the president of the United States, to the president of the Senate and the speaker of the House of Representatives of the United States Congress, and to all the members of the Texas delegation to Congress with the request that this resolution be entered in the Congressional Record as a memorial to the Congress of the United States of America.

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## **Leslie Savage**

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**From:** Alex Schoch  
**Sent:** Wednesday, April 17, 2019 2:27 PM  
**To:** David Cooney; Leslie Savage  
**Subject:** FW: EPA Interpretation - The CWA Does Not Apply to Discharges that Flow Through Groundwater  
**Attachments:** 2019-04-15 EPA CWA - Groundwater interpretative\_statement\_factsheet.pdf;  
2019-04-15 EPA Interpretive Statement - NPDES Applicability to Discharg....pdf

FYI – you may have already seen this.

Alex

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**From:** Tom Clarke <tclarke@imcc.isa.us>  
**Sent:** Wednesday, April 17, 2019 11:38 AM

### **E - MEMO**

**To:** Abandoned Mine Lands Committee  
Coal Environmental Affairs Committee  
Hardrock/Non-Coal Environmental Affairs Committee

**From:** Tom Clarke, Executive Director

**Re: EPA Interpretative Statement on Application of Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) Program to Releases from a Point Source into Groundwater**

On Monday, April 15, 2019, the Environmental Protection Agency released an Interpretative Statement concerning the application of the NPDES program to discharges into groundwater. Although EPA had spoken to this issue before in various contexts, this Statement is the first time EPA has comprehensively addressed the application of the CWA in this area. It follows EPA's solicitation of comments on this subject for a ninety-day period from February to May, 2018. EPA will take additional comments on what else may be needed to provide further clarity and regulatory certainty on this issue for a forty-five day period following publication of

notice in the Federal Register, which should happen in the next couple of weeks. A pre-publication copy of this notice that contains the Interpretive Statement is attached. A Fact Sheet EPA issued with this Statement is also attached.

**Interpretation:** EPA has concluded that the CWA is best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage, regardless of a hydrologic connection between the groundwater and jurisdictional surface water.

**Limits on the Applicability of the Interpretation:** EPA has decided not to apply its interpretation in the 9<sup>th</sup> or 4<sup>th</sup> Circuit, pending further clarification from the United States Supreme Court. These two circuits have interpreted the law differently than EPA has in this Statement. The decisions in which these circuits made their interpretations are pending in the United States Supreme Court. The Interpretive Statement guides EPA's interpretation of the CWA elsewhere in the country.

The 9<sup>th</sup> Circuit states that are excluded from the Interpretive Statement are:

Alaska, Arizona, California, Hawai'i, Idaho, Montana, Nevada, Oregon and Washington

The 4<sup>th</sup> Circuit states that are excluded are:

Maryland, North Carolina, South Carolina, Virginia and West Virginia

**The Status of the Cases in the Supreme Court:** The Court has granted certiorari in the 9<sup>th</sup> Circuit case, *County of Maui v. Hawaii Wildlife Fund, et al.*, and established a briefing schedule. The Court has not acted on a petition for certiorari in the 4<sup>th</sup> Circuit case, *Kinder Morgan Energy Partners, LP v. Upstate Forever*. At this point, I suspect the Court will refrain from doing anything with the *Kinder Morgan* case until after it has addressed the *County of Maui* case.

**Details of the Interpretation:** At page 17 of the pre-publication notice, EPA explains its interpretation.

[T]he best, if not the only, reading of the statute is that all releases to groundwater are excluded from the scope of the NPDES program, even where pollutants are conveyed to jurisdictional surface waters via groundwater. This interpretation is appropriately tailored to releases to groundwater. On this view, because the CWA clearly evinces a purpose not to regulate groundwater, and because groundwater is extensively regulated under other statutory regimes . . . any circumstance in which a pollutant is released from a point source to groundwater is categorically excluded from the CWA's coverage. The interposition of groundwater between a point source and the navigable water thus may be said to break the causal chain between the two . . .

Thus, EPA establishes a "bright line" approach under which there is no NPDES jurisdiction over a discharge that flows as groundwater at any point before it reaches a water that is clearly jurisdictional under the CWA. EPA's position differs from the legal theories applied by all of the Circuit Courts of Appeal that have recently addressed this issue, including the two 6<sup>th</sup> Circuit cases that reached the same result as EPA would on this issue. The circuit courts have focused on the meaning of the CWA phrase which establishes NPDES jurisdiction for point source discharges "to navigable waters". In *Kentucky Waterways Alliance v. Kentucky Utilities Co.* in 2018, the 6<sup>th</sup> Circuit found NPDES jurisdiction to exist only where a pollutant is added directly to jurisdictional waters from a "point source conveyance" rather than through some other means.



Like the 6<sup>th</sup> Circuit, the 9<sup>th</sup> and 4<sup>th</sup> Circuits also focused on the meaning of “to navigable waters”, but reached the opposite result. The 9<sup>th</sup> Circuit upheld NPDES jurisdiction where a discharge that reaches navigable waters after flowing as groundwater is “fairly traceable” to a point source. The 4<sup>th</sup> Circuit would uphold NPDES jurisdiction for a discharge that flows as groundwater for a portion of its path before reaching navigable waters when that discharge is “sufficiently connected to navigable waters”.

EPA’s new interpretation does not distinguish between “direct” addition of pollutants to jurisdictional waters and “indirect” or “less than direct” addition of pollutants. Instead, EPA’s interpretation is that NPDES jurisdiction is lost when a discharge becomes groundwater. As EPA has proposed in its WOTUS definition, NPDES jurisdiction would still exist over discharges from a point source that reach jurisdictional waters via a “direct surface hydrologic connection”.

In reaching its interpretation, EPA has decided that the portions of the CWA that refer to groundwater can be grouped into two classes. They are either “forward-looking sections aimed at gathering information that could inform subsequent legislation and current state efforts to regulate discharges to groundwater” or “sections addressing state programs to manage nonpoint source pollution, evidencing Congress’s intent to retain states’ lead role with respect to both nonpoint source and groundwater pollution.” Neither group is a part of the NPDES program. Nor do they, according to EPA, affect its interpretation that discharges to groundwater are clearly not subject to the NPDES program. EPA believes the text, structure and legislative history of the CWA reflect an intent to not regulate groundwater under the NPDES program.

Notably, both EPA and the court decisions it cites in the Interpretive Statement recognize that when Congress adopted the CWA, it chose not to occupy the whole of the regulatory space to which the CWA could legitimately be applied. Foreseeably, there will be some who believe the EPA’s interpretation eliminates CWA jurisdiction over a significant swath of area that had previously been thought to be within its coverage. There may be calls for a legislative fix for a “hole” in the CWA’s coverage. This is likely to intensify if the Supreme Court backs EPA’s interpretation. Should Congress choose to clarify the CWA by eliminating this “hole” in its application, the current EPA position seems to acknowledge Congress would be acting within its authority in so doing.

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